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No. 82-95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORDASILLA CORPORATION

Petitioner,

v.

NORFOLK SHIPBUILDING & DRYDOCK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether damages may be recovered for the loss of use of a $750,000 ocean-going yacht which is used solely for pleasure when the yacht is detained for a period of fourteen months solely as a result of a shipyard's negligence.

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OPINIONS BELOW

The order of the Court of Appeals for the Fourth Circuit is included in the Appendix hereto, beginning at page 1a. The Judgment, and Opinion and Order of the District Court for the Eastern District of Virginia, Norfolk Division are included in the Appendix hereto, beginning at page 3a.

JURISDICTION

The decision of the United States Court of Appeals for the Fourth Circuit was rendered on April 16, 1982, and its order was entered on April 16, 1982.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NORDASILLA CORPORATION

Petitioner,

v.

NORFOLK SHIPBUILDING &
DRYDOCK CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

STATEMENT OF THE CASE

The facts material to the consideration of the sole question on appeal were stated succinctly by the District Court in the findings of fact contained in its Opinion and Order. The Petitioner adopts the following findings of fact as a portion of its statement of the case.

> Plaintiff [Petitioner herein], a Panamanian corporation, was at all material times owner of the yacht ALLISA [*sic*]. The vessel is 120 feet long, 23 feet in

breadth and draws approximately eight feet, six inches. She has a steel hull, is equipped with twin diesel engines and is intended to be capable of ocean travel. The vessel was built in Scotland in 1963 and was purchased by the plaintiff corporation in France in November 1975 at a net cost of $675,000.00. At all material times the vessel was of Panamanian registry and at no time was it of American registry. (5a)[1]

Defendant corporation [Respondent herein] is a ship-builder and repairer with facilities in Norfolk, Virginia. (5a)

Subsequent to her purchase in France, the ALLISSA [*sic*] was brought across the Atlantic Ocean under her own power and arrived at the defendant's shipyard in Norfolk, Virginia on April 12, 1976. The vessel was left with defendant corporation for a number of repairs. . . . (5a-ba)

On approximately July 1, 1976 the vessel departed the defendant's Norfolk shipyard and cruised to Montreal, Quebec where it was a host vessel for 1976 Olympic activity, thereafter toured the Great Lakes and returned to defendant's ship repair facilities on November 12, 1976 for additional repair work . . . . (6a)

On February 3, 1977, while the vessel was in the sole care and custody of the defendant, a fire occurred on board which caused substantial damage to several state rooms, the galley and other areas . . . . Defendant acknowledged liability for the fire. Defendant undertook to correct the fire damage and restore the vessel . . . . (6a)

. . . .

. . . [P]laintiff lost the use of the vessel for approximately 14 months (from February 3, 1977 to April 5, 1978) as a direct result of the fire for which defendant acknowledges liability. (22a)

---

[1] Page references are to the Appendix hereto.

. . . .

Plaintiff corporation has never been and apparently was never intended to be a profit-making company or a "business" in the ordinary sense of the word. It was formed by Julian Armstrong, Jr. and his wife Pauline S. Armstrong for the purpose of documenting and registering the foreign vessel. The Armstrongs are the principal shareholders of plaintiff. Mr. Armstrong is president and Mrs. Armstrong is vice-president of the plaintiff corporation. (7a)

At the time the vessel was purchased, it was the intention of the Armstrongs to cruise to the United States by way of the Carribean, to participate as host vessel owners in the 1976 Olympic Games at Montreal, Quebec, to tour the Great Lakes, to cruise down the east coast through the Panama Canal and up the west coast to Alaska, returning through the Carribean and to cruise thence to Europe for resale of vessel. It was never intended by the Armstrongs or the plaintiff to charter the vessel or to derive income from her in any way other than ultimate resale. (7a)

The Petitioner filed suit in the United States District Court for the Eastern District of Virginia, Norfolk Division, seeking to recover, among other things, for the loss of use of the vessel during the subject 14 month period. Jurisdiction was predicated upon 28 U. S. C. § 1333.

The District Court found that the Plaintiff suffered loss of use of the vessel in a factual and practical sense. (28a) However, the Court ruled that as a matter of law it was prohibited from awarding damages for loss of use. (28a)

The sole issue brought by the Plaintiff before the Fourth Circuit on appeal was in effect the same question now being presented to this Court herein. The Fourth Circuit affirmed the judgment of the District Court without a discussion of the applicable law. (2a)

REASONS FOR ALLOWING THE WRIT

THE DISTRICT COURT AND THE FOURTH CIRCUIT MISINTERPRETED *THE CONQUEROR* SINCE *THE CONQUEROR* DID NOT ESTABLISH AS A MATTER OF LAW THAT DAMAGES FOR LOSS OF USE OF A PLEASURE VESSEL ARE NOT RECOVERABLE

The Fourth Circuit affirmed the District Court's holding that as a matter of law it was compelled to deny the Petitioner damages in compensation for loss of use of the ALISSA. (2a) In rendering its decision, the District Court stated:

> It strikes one as *fundamentally unfair* that a yacht-owner can be deprived of the use of *an asset of substantial value* (in the range of $750,000.00 to $1,000,000.00 on the facts of this case) *for a substantial period solely as a result of another's negligence and yet be wholly denied money damages for such loss of use simply because the asset was a pleasure craft.* One wonders why the tortfeasor should benefit from the fact that an asset owner chose to forego commercial operations when *there is far less speculative nature or other question concerning ascertainable damages in these circumstances than there is concerning general damages in the run-of-the-mill personal injury case.* (Emphasis ours). (30a-31a)

> An aspect of this case which favors the plaintiff is the time factor involved. The cases cited by the defendant *did not involve the length of time presented by the facts in this case.* Also, while the arguments against speculative damages may have some merit, a rule of law which allows *no* damages for loss of use for a pleasure craft, no matter what its nature and no matter what the length of time, appears on the surface to be draconian. A treatise on the subject indicates a trend toward the policy of allowing recovery for loss of use. See D. Dobbs, *Remedies*, Sec. 5.11, Loss of Use Resulting from Injury or Destruction of Chattels (West Publishing Co., Hornbook Series). (Court's emphasis). (31a)

In spite of equities which would cause the undersigned to decide differently if this court were writing on a clean slate, the current state of the law compels a holding that plaintiff is not entitled to general damages to compensate for its loss of use of the vessel. Because of this conclusion of law, no attempt is made to determine conclusively what would have been a proper measure of damages or method of computing damages for loss of use.[10] (Emphasis ours). (31a)

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[10] If the law changed, or if the Fourth Circuit, on the facts of this case, should deem damages for loss of use awardable, an issue concerning the proper measure of such damages would arise. Plaintiff urges the net charter rate as a measure of damages. However, this measure would assume or require proof of a vessel in top operating condition and would require detailed proof of rates and expenses and likely charters to arrive at a fair net. Such a measure could be unfair to the extent it might result in application of a lucrative charter rate to a vessel which was never chartered, which could not legally be chartered and concerning which charter was not only never contemplated but was expressly declined.

A fairer measure of damages which would be considerably easier to apply (and which would result in far less distracting evidence over collateral detail) would consist of application of a fair average interest rate earnable during the loss-of-use period to the value of the vessel just preceding the event resulting in loss of use. An alternative rate could be that applicable to delinquent federal income tax payments during the loss of use period. Use of the state "legal" or judgment rate would cause undesirable variance in result depending on a location of the tortfeasor and such rates are generally below prevailing interest rates on investments. (31a-32a)

The foregoing notwithstanding, the District Court interpreted *The Conqueror,* 166 U. S. 110, 17 S. Ct. 510 (1897) [hereinafter cited as *The Conqueror*]; and *Thomson* v. *United States,* 266 F. 2d 852 (4th Cir. 1959) [hereinafter cited as

Thomson] as compelling a holding that damages for detention of a pleasure yacht are not recoverable as a matter of law. The Fourth Circuit affirmed.

The Petitioner respectfully submits that *The Conqueror* has been misinterpreted by the court below and previously by the Fourth Circuit Court of Appeals in *Thomson* and contends that *The Conqueror* never held or intended to hold that there can be no recovery as a matter of law for the loss of use of a pleasure yacht.

The CONQUEROR was a seagoing schooner rigged screw steamship 182½ feet long, about 25 feet wide and of 372 gross tons (i.e., her hull enclosed 37,200 cubic feet of space). Its owner, Frederick W. Vanderbilt, purchased the foreign built vessel in England for about $75,000 and brought the yacht to the United States in July of 1891.

The CONQUEROR cruised the east coast until August 27, 1891 when it was seized by the Collector of Customs on the ground that the yacht was a dutiable imported article.

Vanderbilt filed a liable against the Customs Collector seeking return of the yacht and damages for her wrongful detention.

In the district court Vanderbilt recovered the yacht and a total of $21,742.34 in damages. Of this amount, $15,000 was awarded for demurrage for detention of the yacht from August 27, 1891 to February 23, 1892, a period of five months and seven days.

The decree was affirmed in the Circuit Court of Appeals and the Customs Collector's successor petitioned for and was granted a writ of certiorari.

Two questions were involved in the merits of the case:

> First, whether this vessel was taxable under the tariff laws: second, *whether the award of damages was justified by the law and the testimony.* 17 S. Ct. at 511 (Emphasis ours).

After deciding the vessel was not dutiable and the Collector was liable for its wrongful arrest, the court stated:

> The main question in this case turns upon the proper measure of damages. In the amount of $21,742.24, awarded by the final decree of the district court, was included the sum of $15,000, "for loss of use of boat while detained by the respondent, from August 27, 1891, to February 3, 1892, at $100 per day." This is the principal item of damage to which objection is made in this court.
>
> That the loss of profits *or of the use of a vessel* pending repairs, or other detention, arising from a collision or other maritime tort, and commonly spoken of as "demurrage," is a proper element of damage, is too well settled both in England and America to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty. In one of the earliest English cases upon this subject (*The Clarence*, 3 W. Rob. Adm. 283), it was said by Dr. Lushington that "*in order to entitle a party to be indemnified for what is termed in this court a 'consequential loss,' being for the detention of his vessel, two things are absolutely necessary,—actual loss, and reasonable proof of the amount.* * * * It does not follow, as a matter of necessity, that anything is due for the detention of a vessel while under repair. Under some circumstances, undoubtedly, such a consequence will follow, as, for example, where a fishing voyage is lost, or where the vessel would have been beneficially employed." (Emphasis ours).

17 S. Ct. at 516.

The Petitioner submits that the Court never intended to hold that only loss of profits from a vessel in commercial use could ever be recovered. If that were so, the court would not have inserted the words "of the use of a vessel" preceded by the conjunction "or" after the words "That the loss of profits." In its most common usage, the conjunction "or" is a function word utilized to indicate an alternative.

Furthermore, the Petitioner submits that the Supreme Court denied damages for loss of use in *The Conqueror* primarily because the Plaintiff failed to adequately prove the amount of damages he sustained as a result of his loss of use of the vessel, rather than because the CONQUEROR was a pleasure vessel. This submission is based upon two excerpts from the opinion in *The Conqueror,* which are as follows:

> [W]e are bound to say that their [Vanderbilt's experts] testimony falls far short of establishing such a case of loss of profits as entitles the libelant to recover this large sum for the detention of his yacht . . . .
>
> and
>
> We think the testimony upon the subject of demurrage in this case should have been held to be insufficient.

17 S. Ct., at 519.

The Conqueror was interpreted in this manner by Judge Learned Hand in *The Vanadis,* 250 F. 1010 (S. D. N. Y. 1918) [hereinafter cited as *The Vanadis*]. In that case, the yacht VANADIS was damaged by collision. The commissioner ruled that the owner was not entitled to detention for the months she lost and the exception taken was allowed. The court's interpretation of *The Conqueror* was articulated thusly:

> On principle it seems to me impossible that we should draw any distinction between yachts and any other property capable of use only as means of recreation or pleasure. Nobody has any hesitation about such as are consumable, like wines, or flowers, or perfumes, or tobacco. It would be a fatuous defense against an action for injuries to such as these to prove that the owner would certainly have consumed them himself. Furthermore, if the defendant had wrongfully destroyed a yacht or motorcar, he would be hardier than most, were he to offer to show that the owner was bound not to sell or to let it. Yet surely there can be no distinction, at least it would seem so, between the loss of a part of the recreation derivable from such property and the loss of the whole. All of them in the end are consumable, and the difference is only in the extent of loss.

> But it is urged that the contrary is established in The Conqueror, ... *I must concede that some of the language in that case, broken from its context, lends itself to that conclusion, but the decision involved nothing of the kind. It turned upon the dubiousness of the proof of value of the yacht. Doubtless that is a necessary condition of damages here as elsewhere . . . . I see no reason to think that, if the exchange value of the yacht's use in The Conqueror, supra, had been established in the customary way, the libelant would have had further difficulty in his recovery.* (Emphasis ours).

250 F. at 1010-1011.

The Supreme Court had occasion to address *The Conqueror* decision in *Brooklyn Eastern District Terminal* v. *United States*, 287 U. S. 170, 53 S. Ct. 103 (1932) [hereinafter cited as *Brooklyn*]. The *Brooklyn* litigation resulted from a collision between the government's dredge RARITAN and the terminal's tug INTEGRITY. The trial court held both vessels at fault and decreed the damages should be divided equally under the rule then prevailing. When the case reached the Supreme Court, the single point of demurrage remained in controversy. The district court allowed the terminal $11,700 loss of use for the INTEGRITY computed at $150 per day for 78 days, the market hire of another tug, though no substitute tug was hired. The Court of Apeals excluded this item (54 F. 2d 978) and certiorari was granted.

The terminal normally used three tugs to shuttle railcar floats about the harbor. While the INTEGRITY was undergoing repairs, it made do with its remaining two tugs, working them overtime as necessary. No evidence was offered as to the extra expense incurred. No evidence was adduced from which the court could predicate an award upon interest computed on the capital value of the tug. The Court denied the terminal recovery for demurrage on the rationale that:

> So here. The petitioner was engaged in an established business using tugs for a single purpose. It had no thought to turn that business into one of a different kind while this

> tug was out of service. Mindful of the need to minimize the damages, it used to the full its available resources, and was able by special effort to make them do the work. We are unable to accept the argument that the expenses which it saved are to be charged to the respondent as if they had not been saved at all.

287 U. S. 170, 177; 53 S. Ct. 103, 105.

However, in reaching its decision, the following discussion ensued:

> *The vessel may be a yacht, employed for pleasure and not for business. Even then, in the judgment of many courts, the value of the use may be considered by the triers of the facts in fixing the recovery if there has been a substantial impairment of that enjoyment for which such vessels are maintained.* The Lagonda, supra; Cook v. Packard Motor Car Co., supra; Banta v. Stamford Motor Co., 89 Conn. 51, 56, 92 A. 665; Perkins v. Brown, supra; Hunt Co. v. Boston Elevated R. Co., 199 Mass. 220, 235, 236, 85 N.E. 446; The Astrakhan, (1910) P. 172, 181. *There are statements in The Conqueror* (page 133 of 166 U.S., 17 S.Ct. 519) *that may be in conflict with that view, but they were not essential to the judgment* (page 134 of 166 U.S., 17 S.Ct. 519), *and in the light of later decisions as to the loss of pleasure vehicles are unquestionably in opposition to a strong current of authority.* See cases, supra. The owner of the Conqueror would not have let his yacht to any one if there had been no occasion to repair her, nor during the season that she was out of service would he have used her for himself. The Conqueror, 166 U.S. at page 134, 17 S. Ct. 510, 41 L.Ed. 937. There was *neither* interference with profit *nor substantial disturbance of enjoyment. The court did not hold that even then there could be no recovery whatever.* Cf. Cook v. Packard Motor Car Co., supra, at page 596 of 88 Conn., 92 A. 413. *It held that recovery was excessive when based on the returns of an imaginary letting.* . . . (Emphasis ours)

287 U. S., at 175; 53 S. Ct., at 104-105

The case which the District Court considered to be dispositive is *Thomson*. The District Court in the instant case, and the Fourth Circuit in *Thomson* and the instant case, interpreted *The Conqueror* as holding that there can be no recovery for loss of use of a pleasure vessel as a matter of law.

Thomson arose as a result of a collision between the 55 foot diesel yacht MOBY DICK and the wreck of the gunnery target ship SAN MARCOS. The district court held both parties at fault and divided damages equally under the rule then prevailing. The yachtowner appealed and the government cross-appealed. The Fourth Circuit affirmed. We infer that the MOBY DICK was detained for 99 days following the collision on April 22, 1957, since her owner was awarded his captain's salary, maintenance and expense for that period. 266 F. 2d, at 856. In discussing the yachtowner's claim for loss of use, the Fourth Circuit cited *The Conqueror* for the proposition that:

> Demurrage is not allowable damage in a case of this sort, for valuation of the loss of use of pleasure craft is highly speculative and immeasurable. The Conqueror, 166 U. S. 110, 17 S. Ct. 510, 41 L. Ed. 927 .... (Emphasis ours).

266 F. 2d, at 856.

The Petitioner submits that the Fourth Circuit misinterpreted *The Conqueror* since the Supreme Court did not utter either expressly or impliedly any rule that no recovery may ever be had for loss of use of a pleasure craft because its valuation is highly speculative and immeasurable.

Two eminent jurists, Justice Cordozo, in *Brooklyn*, and Judge Learned Hand, in *The Vanadis*, have understood *The Conqueror* as *not* holding that recovery cannot be had under any circumstances for loss of use of a pleasure yacht. The Petitioner submits that this is the proper interpretation and that *The Conqueror* was accordingly misinterpreted by the Fourth Circuit.

THE DECISIONS OF THE FOURTH CIRCUIT IN *THOMSON* v. *UNITED STATES* AND THE CASE AT BAR ARE IN CONFLICT WITH DECISIONS OF THE SUPREME COURT, THE SECOND CIRCUIT, CERTAIN DISTRICT COURTS AND CERTAIN STATE COURTS OF LAST RESORT ON THE SAME MATTER.

As discussed above, the Supreme Court in *Brooklyn* stated that the Court in *The Conqueror* did not hold that there could be no recovery for loss of use of a pleasure vessel.

In *The Vanadis*, also discussed above, the court cited *The Eros*, 251 F. 45 (2d Cir. 1918), for the proposition that "the charterer of a yacht is entitled to damages for withdrawal [of the yacht from charter] by the owner during the season". The Southern District of New York then proceeded to allow damages for the detention of the yacht involved in *The Vanadis*.

As early as 1890, the Eastern District of New York granted damages for loss of use of a yacht. In *The Lagonda*, 44 F. 367 (E. D. N. Y. 1890), noted by the Supreme Court in *The Conqueror* to be one of the yacht cases for which demurrage had been awarded, the yacht was idle for eight days by collision. It cost $36,000 and the commissioner, to whom the case had been referred, allowed interest on the purchase price for eight days for a total of $48. Owners took exception claiming entitlement to the charter rates. The district court allowed the exception and awarded the equivalent of eight days charter hire stating, *inter alia*, the following:

> It appeared before the commissioner that the Lagonda was a pleasure boat, kept for the personal use of the owner, and without any intention to use her for profit; .... No evidence was introduced to show that the owner desired or

> sought a substitute for the yacht during that period. . . . It cannot be doubted that demurrage is recoverable for the detention of a yacht caused by a wrongful act.

44 F., at 368.

Likewise, damages for loss of use of a pleasure yacht were allowed by the Southern District of Florida in *Finkel* v. *Challenger Marine Corp.*, 316 F. Supp. 549 (S. D. Fla. 1970), and the Eastern District of North Carolina in *Yachts, Inc.* v. *The Edward F. Farrington,* 146 F. Supp. 754 (E. D. N. C. 1956).

The Western District of Pennsylvania awarded detention damages predicated upon the value of the vessel, the length of the detention and the legal interest rate in *English Whipple Sailyard* v. *Yawl Ardent,* 459 F. Supp. 866 (W. D. Pa. 1978).

Under analogous circumstances, state courts of last resort have allowed damages for loss of use of automobiles used for pleasure purposes. See *Cook* v. *Packard Motor Car Co. of New York,* 88 Conn. 590, 92 A. 413 (1914); *Holmes* v. *Raffo,* 374 P. 2d 536 (S. Ct. Wash. 1962); *Stephens* v. *Foster,* 51 P. 2d 248 (S. Ct. Ariz. 1935); *Perkins* v. *Brown,* 177 S. W. 1158 (S. Ct. Tenn. 1915).

The Petitioner submits that the decisions of the Fourth Circuit in *Thomson* and the case at bar are in conflict with the above cited decisions of the Supreme Court, the Second Circuit, certain District Courts and certain state courts of last resort on the same matter.

CONCLUSION

It is respectfully submitted that *The Conqueror* has been misinterpreted by the courts below, resulting in an interpretation at variance with an interpretation previously made by this Court and interpretations made by other Courts of Appeal and various District Courts. This has bred confusion in the law which the Petitioner submits should be settled by this Court, by allowing this Petition.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

For the Fourth Circuit

No. 81-1978

Nordasilla Corporation

Appellant,

v.

Norfolk Shipbuilding & Drydock Corporation,

Appellee.

No. 81-2028

Nordasilla Corporation,

Appellant, [*sic*]

v.

Norfolk Shipbuilding & Drydock Corporation,

Appellee. [*sic*]

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT NORFOLK

JAMES T. TURNER, Magistrate.

Argued: March 30, 1982 Decided: April 16, 1982

Before WIDENER and SPROUSE, *Circuit Judges,* and KISER*, *District Judge.*

Michael A. Snyder (Bradley, McMurray, Black & Snyder on brief) for *Appellant/Cross-Appellee;* G. William Birkhead, Robert O'Donnell (Vandeventer, Black, Meredith & Martin on brief) for *Appellee/Cross-Appellant.*

* Honorable Jackson L. Kiser, United States District Judge for the Western District of Virginia, sitting by designation.

PER CURIAM:

In February 1977, Nordasilla's yacht was damaged by fire while it was undergoing repairs in Norfolk's shipyard. Nordasilla was without the use of the yacht for over a year as a result of the fire.

Nordasilla brought suit seeking compensation for damage related to the fire, for loss of use of the yacht while it was undergoing repairs, and for non-fire related repairs negligently done. Norfolk acknowledged liability for the fire, but not for all the damages claimed. The district court awarded Nordasilla additional damages attributable to the fire and unrelated claims, but denied compensation for loss of the yacht.

In the principal point in this appeal, we are asked to distinguish the present case from two earlier cases which established that damages for loss of use of a pleasure craft are not recoverable. *The Conqueror,* 166 U.S. 110 (1897); *Thomson v. United States,* 266 F2d 852 (4th Cir. 1959). We decline the invitation to do so.

We further hold that the trial court's rejection of Norfolk's defense of laches was not erroneous and its award of prejudgment interest was not an abuse of discretion.

The judgment of the district court is accordingly

AFFIRMED.

Filed Sept. 2, 1981
JCB, Clerk
U.S. District Court
Norfolk, Virginia

UNITED STATES DISTRICT COURT

For the Eastern District of Virginia

Norfolk Division

Nordasilla Corporation,
Plaintiff,

vs.

Norfolk Shipbuilding &
Drydock Corporation,
Defendant.

Civil Action
No. 79-630-N

JUDGMENT

This action came on for trial before the Court, Honorable James T. Turner, United States Magistrate, presiding, and the issues having been duly tried and a decision having been duly rendered,

It is Ordered and Adjudged that the plaintiff, Nordasilla Corporation, recover of the defendant, Norfolk Shipbuilding & Drydock Corporation, the sum of Seven Thousand, Seven Hundred Fifty-six and 57/100 Dollars ($7,756.57), with simple interest at the rate of 12 percent per annum from February 1, 1979, until paid; and is further

ORDERED that the defendant's counterclaim is denied and dismissed.

Dated at Norfolk, Virginia, this 1st day of September, 1981.

W. Farley Powers, Jr.
Clerk of Court
Jean L. Basright
Deputy Clerk

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Virginia

Norfolk Division

Nordasilla Corporation, *Plaintiff,* vs. Norfolk Shipbuilding & Drydock Corporation, *Defendant.*	Civil Action No. 79-630-N

OPINION AND ORDER

This matter was referred to the undersigned United States Magistrate for trial and disposition pursuant to the provisions of 28 U.S.C. Sec. 636(c).

A. STATEMENT OF THE CASE

1. Background

This civil action was instituted by complaint filed June 25, 1979 asserting claims arising from alleged failure to correct certain fire damage to an ocean going yacht. By amended complaint filed April 29, 1980, plaintiff asserted additional claims based on allegedly faulty repair work with respect to the yacht performed in the spring of 1976.

Defendant filed a counterclaim seeking judgment for, *inter alia,* the balance allegedly due for fire damage repairs performed by it and for the Virginia sales tax allegedly due with respect to certain other repairs performed by it.

The trial was conducted on June 9, 10 and 11, 1980.

2. Issues Presented

1. Whether plaintiff is entitled to recover from defendant for alleged breach of contract to repair a vessel and, if so, the measure and amount of damages.

2. Whether plaintiff is entitled to recover from defendant (1) for alleged improperly performed repairs of fire damage to a vessel for which defendant acknowledged liability and (2) for other costs, expenditures and losses allegedly resulting from said fire damage, and, if so, the measure and amount of damages.

3. Whether defendant is entitled to recover on its counterclaim against plaintiff for costs of performing fire damage repairs (to the extent such costs exceeded $300,000.00) and for state sales tax applicable to materials furnished with certain repairs.[1]

B. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Findings of Fact

Plaintiff, a Panamanian corporation, was at all material times owner of the yacht ALLISSA [*sic*]. The vessel is 120 feet long, 23 feet in breadth and draws approximately eight feet, six inches. She has a steel hull, is equipped with twin diesel engines and is intended to be capable of ocean travel. The vessel was built in Scotland in 1963 and was purchased by the plaintiff corporation in France in November 1975 at a net cost of $675,000.00. At all material times the vessel was of Panamanian registry and at no time was it of American registry.

Defendant corporation is a shipbuilder and repairer with facilities in Norfolk, Virginia.

Subsequent to her purchase in France, the ALLISSA [*sic*] was brought across the Atlantic Ocean under her own power

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[1] Defendant's counterclaim originally further claimed interest on the amount of one set of repairs billed January 25, 1978, payment of which was allegedly delayed but ultimately made. Defendant did not advance this claim at trial, in post-trial briefs or in proposed findings of fact and conclusions of law. It is concluded that defendant has abandoned its claim for interest on the January 25, 1978 billing.

and arrived at the defendant's shipyard in Norfolk, Virginia on April 12, 1976. The vessel was left with defendant corporation for a number of repairs including modifications to the electrical system and the sanitation system's discharge pump activation devices. The precise contractual arrangements pertaining to these repairs are in sharp dispute.

On approximately July 1, 1976 the vessel departed the defendant's Norfolk shipyard and cruised to Montreal, Quebec where it was a host vessel for 1976 Olympic activity, thereafter toured the Great Lakes and returned to defendant's ship repair facilities on November 12, 1976 for additional repair work, including additional modifications to the discharge portion of the sanitation system. The precise contractual arrangement pertaining to these repairs is in dispute.

On February 3, 1977, while the vessel was in the sole care and custody of the defendant, a fire occurred on board which caused substantial damage to several state rooms, the galley and other areas but which did not affect the solid state controls or other controls on the electrical system or the battery system and which did not affect the vessel's sanitation system. Defendant acknowledged liability for the fire. Defendant undertook to correct the fire damage and restore the vessel. The precise terms of this undertaking are in sharp dispute although no oral terms or undertakings were involved.

The fire damage repairs were substantially completed on or about April 5, 1978 (although some minor additional fire damage work remained as of that date). Additional modification work which had been requested by the plaintiff prior to the fire (or in any event unrelated to the fire) and some additional minor fire damage work was performed between April 5, 1978 and September 22, 1978 when the vessel left the defendant's shipyard at the request of the defendant.

After departing defendant's shipyard, the vessel sailed to Ft. Lauderdale, Florida by way of Charleston, South Carolina.

It underwent certain electrical repairs at Ft. Lauderdale, the nature, the necessity for and the effect of which are in sharp dispute.

Subsequent to repairs at Ft. Lauderdale the vessel motored northward to West Palm Beach, Florida where it was held for sale and remained for all subsequent times material in this action.

Plaintiff corporation has never been and apparently was never intended to be a profit-making company or a "business" in the ordinary sense of the word. It was formed by Julian Armstrong, Jr. and his wife Pauline S. Armstrong for the purpose of documenting and registering the foreign vessel. The Armstrongs are the principal shareholders of plaintiff. Mr. Armstrong is president and Mrs. Armstrong is vice-president of the plaintiff corporation.

At the time the vessel was purchased, it was the intention of the Armstrongs to cruise to the United States by way of the Carribean, to participate as host vessel owners in the 1976 Olympic Games at Montreal, Quebec, to tour the Great Lakes, to cruise down the east coast through the Panama Canal and up the west coast to Alaska, returning through the Carribean and to cruise thence to Europe for resale of the vessel. It was never intended by the Armstrongs or the plaintiff to charter the vessel or to derive income from her in any way other than ultimate resale.

a. Contract for Spring 1976 Repairs[2]

The first significant contact between the parties having a bearing on the precise contract concerning the spring repairs was in February 1976 at defendant's offices in Norfolk and

[2] For ease of reference, the repairs and renovations to the ALLISSA [*sic*] performed from April 12, 1976 to July 1, 1976 will be referred to as the "spring repairs," and the repairs unrelated to the fire damage and performed during the period of November 1976 to September 1978 will be referred to as the "fall repairs." The term "fire damage repairs" will exclude any "fall repairs."

consisted of a meeting among Mr. Armstrong; Paul Price, the vice-president of defendant; and John Curtis, an assistant vice-president of defendant who was then superintendent of one of defendant's plants. At this meeting there was merely a general discussion of the defendant's capacity to perform repairs on an ocean going yacht including suitable drydocking capacity and personnel and whether defendant had a qualified electrical shop (T. 28, 620). No agreement to perform specific repairs or renovations was concluded at that time. There was no mention of the "red letter clause" form or any reference to its contents at this meeting.

The next significant meeting occurred on April 12 or 13, 1976, at substantially the same time the vessel was brought to defendant's yard in Norfolk. At this meeting were John Curtis, defendant's superintendent of the yard where the work was to be performed; Joseph Beard, defendant's assistant yard superintendent and Mr. Armstrong (T. 32). Harold Varvel, an assistant foreman and head of defendant's electronics shop, may also have been present (T. 32, 545-46, 554-55). The men discussed the items which defendant was to accomplish.

Plaintiff's president requested work of three types including overhaul of the sewage retaining and discharge system and correcting electrical problems in operation of ship's service on battery power (T. 33). This meeting resulted in the preparation by defendant of a list of items to be accomplished (Df.Exh. 6 & 7). Near this same time (probably at the same meeting) plaintiff's president also conferred directly with Harold Varvel, defendant's assistant foreman and head of the shops where electrical work on the ALLISSA [*sic*] would be performed, concerning the purpose of the electrical modifications desired by owner (T. 544-45, 554-55).

The only repairs which were the subject of the contract for spring repairs which are material in this action were those pertaining to modification of the electrical system and to the pump activating devices of the sanitation system.

The contractual arrangement concerning modifications to the electrical system resulted in an undertaking by the defendant to modify the system so that the ship's service batteries could be fully charged after a normal day's operation of the two main generators. The arrangements for the work were informal and, except for defendant's internal memoranda and invoices, were never committed to writing, but clearly defendant undertook to perform work on the generators and their controls to the end that a normal day of running the engines and generators would automatically result in fully charged ship's service batteries to operate the vessel's services solely on battery power for ten to twelve hours. Df.Exh. 6, items 35 and 37; Df.Exh. 7, items 35 and 37; Df.Exh. 8; Pl.Exh. D, items 10 and 11; T. 545-46, 554-55.

Varvel designed the electrical circuit which was installed. He clearly understood the requirement for a system which would result in operation of the ship's services during the evening and night hours without the necessity for running either of the diesel engines with the resulting noise (T. 545-46, T. 554-55).[3]

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[3] There was some initial failure by plaintiff to communicate accurately its intention concerning desired flow of current from the two generators to the bank of ship's service batteries and the remainder of the ship's electrical load (T. 36, 554). Mr. Armstrong used a trade term ("paralelling") [*sic*] which conveyed one impression while he subjectively intended a different wiring configuration (T. 161-62). This difference of intent is not material to a resolution of the disputes in this case. Defendant's objective understanding of the wiring configuration desired by plaintiff was the more desirable (that is, having both generators wired to supply current to the entire electrical load, including ship's service batteries, rather than having one generator provide current solely for the battery charging function and the other generator provide all current for all other electrical needs (T. 554).

The only other repairs which were the subject of the contract for spring repairs which are material in this action were those pertaining to modification of the sanitation system pump activating devices. The contractual arrangement concerning modifications to the sanitation system pump activating devices resulted in an undertaking by the defendant to modify the system to provide for automatic activation of the discharge pumps of the ship's two sanitary holding tanks and installation of an alarm to warn of the need for manual activation. (Df. Exh. 6, item 32; Df.Exh. 7, item 32; Pl.Exh. D, items 7 and 8.)[4]

A point of acute disagreement between the parties concerns whether a writing dated March 2, 1976 (Df.Exh. 1-A), referred to in this litigation as one of the "red letter clause" contract forms, formed a part of the contractual arrangement between the parties for the spring repairs. The document was not signed by any representative of plaintiff corporation. Defendant introduced evidence to the effect that the form was mailed to the plaintiff corporation in care of Mr. Armstrong on or about its date. On conflicting evidence, it is found that neither Mr. Armstrong nor any representative of plaintiff corporation ever received the "red letter clause" form dated March 2, 1976 and its is consequently concluded that its terms and conditions never became part of any contractual arrangement between the parties.

Although there were numerous appropriate opportunities to present a "red letter clause" contract form to Mr. Armstrong and to obtain his signature on the form should he agree to its terms, no such opportunities were availed of. No "red letter

[4] No claims based on faulty *installation* of sanitation system pump switches or alarms was asserted by plaintiff in the final pretrial order entered May 23, 1980. Nevertheless, the claim was dealt with at trial and in post trial briefing as if it had been properly designated as a triable issue. The matter is treated in this opinion as if it had been properly designated as a triable issue.

clause" form was ever presented directly to Mr. Armstrong in person and he was never asked to sign one of the forms (T. 38, 52-53, 493-94) although this is sometimes done with other customers (T. 494). Mr. Armstrong received, on or about May 20, 1976 a "red letter clause" contract form dated May 11, 1976 (Df.Exh. 1-B) which refers to "additional repairs." None of the repairs listed on the May 11, 1976 "red letter clause" involve the electrical repairs or sanitation system repairs in dispute. None of its terms became part of the pre-existing oral contract pertaining to the electrical system and the sanitation system.

b. Contract for Fall 1976 Repairs[6]

It had been arranged prior to the departure of the ALLISSA on July 1, 1976 that it would return in the fall of 1976 for various additional repair work, none of which is material in this action. As a result of difficulties experienced with the sanitation pump activating devices on the summer trip to Montreal and the Great Lakes, it was further understood that additional work would be performed concerning the sanitation system (T. 138). The clearest expression of this undertaking by defendant appears to be in the statement for the services (Df.Exh. 17, items 13, 16 and 18) and the testimony of its machinist, Floyd Painter (T. 513-15), which indicate that defendant installed additional float switches in each sewage holding tank which were to activate gauges, also installed, to indicate tank fluid level, installed sight gauges (sections of clear pipe) in the tanks' discharge lines and installed new discharge pump controls for automatic and manual operation of the pumps.

At some stage during the fall repairs, defendant undertook to conduct a hose test of portholes to determine existence of leaks.

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[6] See footnote 2 above.

Although it was apparently the general intention of the Armstrongs to have the difficulties with the battery charging system which had been experienced on the northern summer cruise corrected during the fall repairs, this did not result in any contractual arrangement between parties concerning such repairs (T. 172-74).

Defendant introduced evidence that it sent to plaintiff corporation a "red letter clause" contract form dated September 3, 1976 (Df.Exh. 1-H) which contains certain limitations on liability and certain limitations concerning the kinds of damages for which the defendant would be liable. Mr. Armstrong, the plaintiff representative to whom the form was addressed, denies having ever received the form.

It is not necessary to resolve whether the contract form was received by plaintiff corporation and whether it thereby became a part of the contractual arrangements between the parties. The terms and conditions of the "red letter clause" dated September 3, 1976 (Df.Exh. 1-H) would have possible significance in this litigation in two ways. It could conceivably affect claims concerning the additional repairs to the sanitation system, neglect of the auxiliary launch (Riva) and porthole flooding insofar as the form provides a time limit for notice of difficulty, a disavowal of the implied warranty of workmanlike service and an avoidance of consequential damages relating to repair work. The other way relates principally to the $300,000.00 limitation on liability which in turn relates to defendant's counterclaim for fire damage repairs to the vessel. In view of the findings set forth below concerning the actual causes of flooding from the sanitation system holding tanks, the adequacy of defendant's hose test of portholes and care of the Riva, and the ruling that defendant's letter dated March 3, 1977 (Pl.Exh. A) would have modified any "red letter clause" which may have constituted a part of the contract for the fall repairs, a ruling concerning whether the September 3, 1976 "red letter clause" (Df.Exh. 1-H) became part of a contract between the parties is unnecessary.

Plaintiff argues that by its terms the September 3, 1976 "red letter clause" applied to work that was performed in Harbor Springs, Michigan on September 3, 1976 and therefore would have no application to the fall repairs even if it had been received by plaintiff (Pl. Post-trial Brief at 13). For reasons identical to those just stated, there is also no need to resolve this issue.

c. Defendant's Undertaking Regarding Fire Damage

Subsequent to the February 3, 1977 fire there was discussion concerning what would next happen to the vessel culminating in a meeting at the defendant's yard on March 3, 1977 at which were present W. D. Payne, defendant's assistant vice-president; John Curtis, defendant's plant super-intendent; Mr. and Mrs. Armstrong; inspectors or marine surveyors representing interests of both parties and/or their insurance carriers, and counsel for both parties (T. 61, 331). At that meeting, Mr. Payne delivered to Mr. Armstrong, as president of plaintiff corporation, a letter dated March 3, 1977 (Pl.Exh. A). That letter included a tentative acknowledgement by defendant of legal liability for the fire damage (which acknowledgement was made final not later than the first day of trial (T. 17-20). By its terms, defendant undertook to make the necessary fire damage repairs and accepted "all legal liability for losses, damages, repairs and renewals." No limitation whatever (other than the then tentative acknowledgement of responsibility for the fire) on this broad undertaking and acceptance of liability for losses was contained in the letter (Pl.Exh. A) or otherwise indicated at the meeting where counsel were present. The letter states on its face (and it was independently established) that the written undertaking and statement of position was a condition precedent to defendant's commencement of fire repairs. The letter acknowledged that it was unusual for defendant to make such a committment. No "red letter clause" form was attached to or referred to in the letter or mentioned at the meeting where counsel were present.

Defendant asserts that a "red letter clause" form dated February 3, 1977 (Df.Exh. 1-I) was a part of or a limitation upon its undertaking as set forth in the March 3, 1977 letter. Findings relating to the February 3, 1977 "red letter clause" form are set forth below in the discussion of defendant's counterclaim. Suffice it to say at this point that it is concluded that said form never became a limitation upon defendant's undertaking concerning fire damage and was never part of any contract between the parties.

d. Faulty Electrical Work

The electrical repair modifications which plaintiff undertook pursuant to the spring contract, to the extent that they involved installation of solid-state controls to achieve automatic charging of the vessel's batteries sufficient to operate ship's service on battery power, were improperly performed.[8]

Defendant clearly understood the scope of the project and undertook the requested modifications concerning the battery charging system. (See factual findings above concerning spring repair contract.)

Defendant promptly contacted McGraw-Edison Company concerning the kinds of controls needed to achieve the desired result and in turn, was promptly advised by letter and pamphlets forwarded with the letter of the proper wiring configuration and control arrangement to achieve the intended result (Df.Exh. 8). The parts required to make the modifications in the manner suggested by McGraw-Edison were promptly ordered.

However, instead of wiring the solid state electrical controls in conformance with the McGraw-Edison suggestions and pamphlets, which would have achieved the desired results

[8] As set forth below as a conclusion of law, the improper work constitutes a breach of the implied warranty of workmanlike service.

(T. 356, 380, 388-90; Df.Exh. 8), defendant's employees decided upon a different wiring configuration and installed only one reverse current rectifier instead of the two which were specified. This resulted in a failure of the solid state electrical components to prevent one of the generator's electrical fields from becoming severely reversed (a condition which required correction in order for the generator and the electrical system to operate at designed capacity), a failure to prevent excessive current from passing through a single reverse current rectifier and a failure to prevent the solid state components from becoming damaged during what should have been routine operation of the generators either singly or simultaneously.

Installation of the solid state controls in accordance with the McGraw-Edison suggestions would have prevented reversal of magnetic field on the affected generator and would have protected the solid state components from damage when both generators operated together or either one alone (T. 356, 365). Defendant's assistant electrical foreman tested the generators after the installation of the solid state controls during the spring repairs. The system malfunctioned, causing reversed field on the generators and destroying a voltage regulator and a reverse current rectifier (T. 594, 598). Still, defendant did not make the system conform to the McGraw-Edison specifications by the use of two reverse current rectifiers.

In addition, the defendant's employees set the limit for the voltage regulators, which they installed, too low to accomplish the objective of fully charging the service batteries with ten to twelve hours of generator operation following ten or twelve hours of silent ship operation (T. 362, 369-70, 390, 403). As a result of the improper voltage regulator setting, it was nearly impossible under ordinary circumstances with a full service battery bank to achieve and hold a charge.

To accomplish the electrical work it undertook to perform, including automatic operation of the battery charging function,

defendant should have installed two reverse current rectifiers (one on the line for each of the two generators), should have wired the two current limiters differently (so that there would be a current limiter on the line from each of the two generators) (T. 406), and should have (1) set the voltage regulators at 243 volts (T. 401), or (2) installed a voltage dropping device with automatic or manual control (Pl.Exh. N, p.2) so that voltage could be lowered from a charging rate of 243 volts to a "float" or a "trickle" rate of 220 volts after the service batteries were fully charged (T. 360-63), or (3) adequately informed plaintiff that the voltage regulators could be adjusted manually from the control panel back and forth between a charging rate and a "float" rate (T. 400-401) (albeit that plaintiff had requested a system that would operate automatically (T. 34-36)).

Defendant's failure to accomplish these items resulted in repeated damage to the single reverse current rectifier (which may have in turn contributed to the battery charging problem (Eisner Dep. at 9)), damage to one of the voltage regulators installed by defendant and reverse current requiring correction on one of the ship's generators. Properly installed, the solid state components should have lasted indefinitely (T. 398-99).

Of the three kinds of solid state controls installed by the defendant, only the voltage regulators were positioned so that they could properly perform their function and they were set too low to permit proper charging of the service batteries.

Although the wiring configuration and arrangement of the solid state controls and the use of only one reverse current rectifier may have been adequate if the electrical system were to operate with only one of the vessel's two generators (T. 434), it could not be operated in parallel (i.e., with both generators running simultaneously to carry a common load, including charging discharged batteries) without resulting in severe reverse residual current on at least one of the generators and damage to the voltage regulators and to the single reverse

current rectifier (T. 434), or at the very least, a severe risk that these mishaps would occur. But the plaintiff had specifically requested paralleling of the generators and the defendant had undertaken modifications to provide paralleling and could have done so with the parts ordered had it followed the directions of McGraw-Edison.

After corrections and repairs made to the system by James Buchanan on January 9, 1979, the only additional work needed to correct the defendant's work consisted of installation of an additional reverse current rectifier and relocation of the current limiters. This work could have been accomplished in one or two days (T. 411).

e. Sanitation System Modifications

Concerning the sanitation system alterations, no improper work by the defendant was proved.

There are two sanitary holding tanks on the vessel, one fore and one aft (T. 148-49). In the spring of 1976 defendant undertook to install electrical probes in the holding tanks so that when the fluid level of a tank reached the level of the probes, a pump to empty the holding tank would be activated and the contents of the holding tank would be discharged overboard. The work further involved installation of an alarm activated by an additional higher probe which would alert ship's personnel that the fluid level had risen above the level for automatic activation of the discharge pump and that the pump should be activated manually. Although it is true that the probes frequently did not activate the discharge pumps automatically and that consequently manual activation was frequently required, the difficulty was in no way the result of improper work by the defendant. The failure of the probes to activate the pump was rather the result of the probes becoming covered with grease and other deposits in the holding tanks (T. 553).

Because of the frequent failure of the electrical probes to activate the discharge pump automatically, plaintiff's representative requested additional modifications to commence in the fall of 1976 (T. 138).

During the fall repairs, defendant installed in each of the sanitary holding tanks, floats which extended into the tanks and which activated a gauge in the engine room when fluid level rose to a point where discharge became desirable (Df.Exh. 17, item 13; T. 513-521). Plaintiff offered no evidence whatever concerning whether the float activated switches installed during the fall repairs properly performed their function of activating fluid level gauges in the engine room. The float switches were not intended to activate discharge pumps but rather to activate gauges indicating that the fluid had reached a level at which the discharge pump should be activated manually.[7]

Subsequent to the fall repair work, there were four flooding episodes which plaintiff blames upon improper work in connection with the sanitation pump activating devices but which were in fact the result of other causes not attributable to the defendant.

The first such flooding occurred through the aft holding tank on August 18, 1978 before the ALLISSA [*sic*] left defendant's yard and while Captain Lee Mellies (plaintiff's employee) was living on board (Df.Exh. 2-J). The flooding

[7] Defense witness Painter testified that the sanitary holding tank automatic controls were removed during the fall repairs and replaced with manual controls even though the probes for automatic activation of discharge pumps were not removed (T. 514). Defendant's Exhibit 17, item 13, indicates that although sewage pump controls were removed, new controls of U.S. manufacture for both automatic and manual operation were installed. Both Mr. Armstrong (T. 150) and Capt. Mellies (Df.Exh. 2-G, item 7) stated that subsequent to the fall repairs the holding tank discharge pumps were satisfactorily operating automatically. It is, therefore, assumed that the capability for automatic operation of the discharge pumps remained in place but that automatic operation could not be depended upon. Defendant's employee warned the crew of the ALLISSA [*sic*] in 1976 in Canada that the electronic probes would fail to activate the pumps and alarms if covered with paper and grease and advised twice daily pumping by manual switch and weekly cleaning of the probes (T. 533).

could have been caused by the siphoning effect resulting from the fact that the sewage holding tanks and commodes were below the outside water level combined with debris causing the check valve, positioned in the side of the ship below water line, to remain open after the tank had been pumped. The flooding might also have been caused by the failure of Capt. Mellies to activate the discharge pumps by manual control when the automatic activation switches and alarm failed to work as a result of not being clean. At any rate, there was no proof that this flooding episode resulted from any fault of or defective work by the defendant. Any suggestion to the contrary is mere speculation.

Before the ALLISSA [*sic*] left defendant's yard in September 1978, one of defendant's employees knowledgeable about the sanitary system explained to Capt. Mellies and two senior crew members that they should not depend upon the sewage alarm system because dirt, scum, oil or paper on the probes could prevent its activation and that they should, at intervals, activate the sewage tank discharge pumps manually. The captain and crew members were instructed how to avoid the siphoning phenomenon which could cause the sewage tanks to fill with seawater and overflow. By the time the vessel left defendant's yard, the captain and senior crew members clearly understood that the automatic alarm [for reasons beyond any control of the defendant] could not be depended upon to work without fail, that it certainly would not work unless its probe was kept clean, that the discharge pump should be activated manually at intervals and that care should be taken to insure that siphoning of outside water back through the check valve and discharge pipes did not occur and how it could easily be prevented (T. 518-21).

The next flooding episode occurred in September of 1978 on the voyage between Norfolk and Charleston when water backed up through a toilet into one of the aft guest staterooms. As with the flooding before the vessel left defendant's yard, this may have resulted from the siphoning effect or from the failure

of the crew to activate the discharge pumps or from other causes. In any event, there was no proof that this flooding was the result of any default of or any defective work by the defendant.

The third and fourth flooding episodes occurred in early 1979 while the vessel was docked in West Palm Beach. These two floodings were the result of a deteriorated or otherwise defective scupper valve or scupper drain (Def.Ex. 2-J). Plaintiff makes no claim that either of these floodings occurring in early 1979 were attributable to neglect or faulty work of the defendant (although it seeks damages for expenses incurred as a result of these episodes). Indeed, Capt. Mellies reported to Mr. Armstrong from West Palm Beach in January 1979 that the sanitary warning systems were working as designed (Df.Exh. 2-G, item 7).

f. Porthole Flooding

A fifth flooding for which plaintiff claims defendant is responsible occurred as a result of porthole flooding in an aft guest state room (T. 333-34) resulting from heavy gale conditions at sea in September 1978 on the trip between Norfolk and Charleston (T. 74). Inspection of the porthole or portholes through which flooding had occurred indicated that gaskets were missing or severely deteriorated. The porthole area involved in this flooding was not damaged by fire and defendant had no responsibility with respect to the portholes in connection with fire repair work. The *only* services the defendant was ever asked to perform with respect to the portholes in question was to conduct a hose test during the fall repairs. The requested hose test was conducted and no leaks were found (T. 529-30). Defendant was never engaged to inspect porthole gaskets or to replace deteriorated gaskets. Plaintiff does not suggest what contract or other event gave rise to any obligations which could make defendant liable for the damage resulting from flooding through portholes.

g. The Riva

At all material times the ALLISSA [*sic*] carried on board an auxiliary boat containing an inboard engine referred to in this litigation as the Riva. The Riva was on board the yacht when it arrived at defendant's yard in November 1976 and remained on board throughout the entire period of fall repairs and fire damage repairs. Plaintiff claims that defendant neglected the Riva during this nearly two-year period when it was in its custody resulting in deterioration for which defendant should be liable. However, it is found that the Riva was in need of repairs or corrective work when it was left with defendant in November 1976 as the result of having been too dry too long (T. 528, 634). The launch received adequate care and protection during the fall and fire damage repairs including replacement of a damaged cover, use of an extra plastic cover and draining of the hull after rainfalls (T. 529).

The Riva was not damaged by the fire and was in no way directly involved in the fire repairs. It is concluded that defendant is not liable to plaintiff under any theory for any damage to or for any cost of repairs to the Riva.

h. Insurance Premiums

Plaintiff incurred substantial insurance premiums for policies covering property damage and liability risks during the period covered by fire damage repairs and therafter. However, due to the conclusion hereinafter stated that these premium payments are not recoverable as a matter of law, no detailed findings are made concerning the precise premium payments, the period for which recovery might have been had, and whether certain types of coverage were necessary.

i. Marine Growth on Hull

The marine growth which accumulated on the hull of the ALLISSA [*sic*] during the entire period of the fall repairs and fire damage repairs was negligible (T. 112). It is concluded

that the defendant bears no responsibility for the cost of hauling and scraping the hull as a result [of] marine growth which may have been found on the hull during its stay in Florida.

j. Damages

Plaintiff suffered unreimbursed costs and expenses as a result of defendant's faulty electrical system modifications and as a result of the fire damage. In addition, plaintiff lost the use of the vessel for approximately 14 months (from February 3, 1977 to April 5, 1978) as a direct result of the fire for which defendant acknowledges liability. Plaintiff suffered no significant loss of use as a result of the faulty electrical repair work.

The ALLISSA [*sic*] was removed from defendant's yard in Norfolk to ports in Florida and remained there primarily, indeed nearly exclusively, because Florida was deemed by plaintiff to be the best location for an intended desirable sale. As early as May 1977, months prior to the departure of the vessel from Norfolk, the plaintiff's principals had decided to seek a sale of the vessel upon completion of repairs (T. 143-44). In addition, legal technicalities concerning foreign registration of the vessel would have prohibited her from being chartered.

No difficulties with the fathometer (depth indicator), radar or electrical system or any other problem which might be attributable to defendant's improper electrical work or the fire damage was a significant factor in plaintiff's failure to charter the vessel or otherwise use the vessel as the principals might after its departure from Norfolk on September 22, 1978.

Defendant was kept advised of plaintiff's post-spring 1976 difficulties with the electrical repairs on a timely basis and had ample opportunity to undertake corrective repairs.

The net cost of the vessel to plaintiff in November 1975 (exclusive of brokerage and legal fees) was $675,000.00. As of June 1980 plaintiff had received a firm offer to purchase the vessel for $750,000.00. As of June 1980 plaintiff reasonably

expected to sell the vessel for a sum which would result in a $1,000,000.00 net payment to plaintiff.

Unreimbursed costs and expenses resulting from the improper electrical repair work are:

Survey & limited corrective work by James Buchanan, electrical Engineer (Pl.Exh. L-14)	$1,105.59
Electrical inspection and repair by Broward Marine, Inc. (reflected on Pl.Exh. L-16, $884.07 + tax of $35.36.)	919.43
Repair work by Broward Marine, Inc. (reflected in item 4 of Pl.Exh. L-26, further explained on Pl.Exh. L-16)	897.95
Cost of one McGraw-Edison 101 R220 voltage regulator	666.08
Total	$3,589.05

Unreimbursed costs and expenses related to the fire damage are as follows:

Shipping charge to accomplish repairs to depth indicator (Pl.Exh. L-12)	$ 5.14
Pro-rata portion of replacement cost of 18 service batteries based on 14 months deterioration over ordinary useful life of 36 months during the period of fire damage repairs (February 3, 1977 to April 5, 1978). Loss computed on per-battery cost including labor, of battery replacement cost reflected on Pl.Exh. L-44	1,848.28
Travel, food and lodging expenses of plaintiff's president reasonably necessary to insure that fire damage was completely repaired and to insure that the vessel was restored to its original condition. (Total includes expenses reflected on Pl.Exh. DD for emergency return, first round trip, third round trip, sixth round trip, ninth round trip, twelfth round trip, and one-half of expenses reflected for the round trip to Ft. Lauderdale.)	2,314.10
Total	$4,167.52

Concerning plaintiff's claims for travel, food and lodging of its president in making sixteen trips to Norfolk and one to Ft. Lauderdale to "supervise" repairs (Pl.Exh. DD), many of the trips appear unnecessary. Beyond the first two trips (the emergency return trip to inspect fire damage and the so called first round trip to arrange for and negotiate fire damage repairs) and the round trip to Ft. Lauderdale, there was no attempt to demonstrate the precise need for each trip. Surely, several trips were reasonably necessary between the first March 1977 round trip, during which arrangements for fire damage repairs were made, and completion of fire damage repairs. In an attempt to do rough justice, expenses for approximately one trip per calendar quarter have been allowed as reasonable. Concerning the round trip to Ft. Lauderdale to confer over the survey concerning disputed fire damage and electrical work claims, 14 days seems excessively long; seven days strikes one as being the maximum time reasonably necessary. Since plaintiff made no attempt to distinguish lodging from transportation expense, plaintiff's expenditure incurred during the "16th round trip" deemed reasonably necessary as a result of fire damage and electrical repairs is reduced to one-half of the total expense.

All of the purported costs and expenses shown on Pl.Exh. K not waived or withdrawn by plaintiff were not shown by a preponderance of the evidence to result from any improper work or neglect of the defendant. All of the costs and expenses shown on Pl.Exh. K would have been incurred by the defendant absent any fire damage and are not attributable to electrical malfunction (with the exception of items duplicated on Pl.Exh. L and specifically addressed as Pl.Exh. L items).

Similarly, all items shown on Pl.Exh. L not included in the listings above must be denied for failure of the plaintiff to establish by a preponderance of the evidence that the incurrence of the cost was a result of any fault of the defendant. Pl. Exh. L-55 bears special mention. Although on Pl.Exh. L-2,

a $56.39 item is described as "repair of RCR [for reverse current rectifier]" and would ordinarily be deemed a direct cost resulting from the improper electrical work, the back-up invoice (Pl.Exh. L-55) suggests that the charge was not for the repair of an RCR. It is not plain what the charge was for and thus this item is one of those which must be denied for failure of proof.

Plaintiff made no effort to prove the cost of correcting the electrical system to a properly parallelled one that could utilize both generators operating simultaneously, adequately charging the service batteries for quiet ship operations for ten to twelve hours per day without damage to the solid state components and without resulting in reverse current to either generator. The testimony of James Buchanan, an electrical engineer, indicated that all necessary work could be accomplished in one day or at the most, two days. Neither his testimony nor report indicated whether one person or a dozen would be involved, what their reasonable compensation would be, or what the cost of any replacement parts might be. Consequently, although plaintiff established entitlement to damages for corrective repairs, there was no proof concerning the amount of such damages. Nevertheless, plaintiff will be allowed the cost of replacing one voltage regulator based on the amount defendant charged for the one damaged by reverse current (Pl.Exh. D, item 11).

For reasons explained above, all claims for losses in connection with porthole or sanitary tank flooding are rejected as not attributable to any fault or neglect of defendant.

Concerning the battery replacement for which plaintiff made claim of $5,544.76 (Pl.Exh. L-44), there was no adequate proof, certainly none by a preponderance of the evidence, that all of the batteries actually needed replacing in November 1978. Similarly, there was no adequate proof of precisely what caused damage to any of the batteries which might have needed replacement.

k. Defendant's Counterclaims

Defendant was fully reimbursed by its liability carrier for its fire damage repairs to the ALLISSA [*sic*]. Defendant is prosecuting the counterclaim in its own right, not as a subrogation claim on behalf of its liability insurance carrier. Defendant at no time prior to this litigation exhibited even the vaguest hint or suggestion that it intended to charge plaintiff for cost of the fire damage repairs to the extent they exceeded $300,000.00 and, indeed, never made reference to any such limitation on liability. The letter in evidence as Pl.Exh. A sets forth the entire written undertaking of defendant with respect to fire damage repairs. The "red letter clause" form dated February 3, 1977 (Df.Exh. 1-I) could not have been prepared on its date, was not referred to, hinted at or raised in any manner during conferences among the principals of both parties on March 3, 1977 culminating in delivery of the March 3, 1977 written undertaking (Pl.Exh. A) and, in any event, was not received by plaintiff until March 10, 1977 and was not signed by or consented to in any way by plaintiff. No statement for fire damage repairs was submitted by defendant to plaintiff.

The $390.95 claim for sales tax liability claimed by plaintiff concerns repairs to a foreign registered vessel used principally in interstate commerce.

2. Conclusions of Law

a. Spring 1976 Contract

The spring 1976 contract did not include the first "red letter clause" provisions (Df.Exh. 1-A) and consequently the disclaimer of the warranty of workmanlike service, the disclaimer of liability for consequential damages, the requirement of notice of defects and complaints within thirty days, and any other provisions thereof which vary from the general law of contracts applicable in the absence of agreement to the contrary contained in the March 2, 1976 "red letter clause" form were never a part of the spring 1976 contract between the parties.

The spring 1976 contract was a maritime repair contract and consequently any time limitations on commencement of litigation with respect to the contract would be controlled by the doctrine of laches rather than by any state statute of limitations.[8] The defendant was kept timely advised of problems plaintiff was having with the electrical system and battery charging system installed by defendant during the spring repairs and plaintiff used due diligence in asserting the claim in litigation when it filed the amended counterclaim on April 29, 1980.[9]

It is concluded that the Amended Complaint concerning claims for faulty electrical work during the spring 1976 repairs was timely filed, that the spring 1976 contract included none of the provisions of the March 2, 1976 "red letter clause" (Df.Exh. 1-A) and that plaintiff is entitled to recover in full for any breach of the spring 1976 contract by the defendant.

The spring 1976 contract included an implied warranty of workmanlike service which was breached by the faulty electrical work described above. Plaintiff is entitled to full recovery for damages resulting from the breach of implied warranty which are determined to be those found above in the amount of $3,589.05.

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[8] "[T]he maritime character of [a] contract to . . . repair a vessel is clear." *Flota Maritima Browning de Cuba, Sociadad Anonima* v. *Snobl*, 363 F.2d 733, 736 (4th Cir. 1966). *See also New Bedford Dry Dock Co.* v. *Purdy*, 258 U.S. 96 (1922).

The Fourth Circuit has stated: "In the enforcement of a maritime claim admiralty prefers the equity rule of laches as opposed to any rigid limitation . . . . This is the law of the sea, *governing irrespective of the form or forum of the suit* . . . ." (Emphasis added.) *Giddens* v. *Isbrandtsen Co.*, 355 F.2d 125, 126 (4th Cir. 1966).

[9] Even if the Virginia three year statute applicable to oral contracts were to apply to plaintiff's claims contained in Count II of the Amended Complaint, the new claims in the Amended Complaint would relate back to the original June 25, 1979 filing and thus be timely if they could be deemed to arise from the same conduct, transaction or occurrence set forth *or attempted to be set forth* in the original complaint. See Rule 15(c), Federal Rules of Civil Procedure.

b. Fire Damage and Fire Damage Repairs

Defendant acknowledges full responsibility for the fire and the consequent damage to the ALLISSA [*sic*] (T. 17-20). There follows from that responsibility all of the liability for negligently causing or permitting occurrence of the fire. Defendant discharged a major portion of its liability by undertaking to "make the necessary repairs." In addition, it acknowledged in writing (Pl.Exh. A) "all legal liability for losses, damages, repairs and renewals." Such legal liability includes responsibility for expenditures by plaintiff which were reasonably necessary to restore the vessel to its pre-fire condition. *Hewlett* v. *Barge Bertie,* 418 F.2d 654, 657 (4th Cir. 1969), *Thomson* v. *United States,* 266 F.2d 852 (4th Cir. 1959). Such expenses on the facts of this case include the travel, food and lodging expense totaling $2,314.10 which are detailed above.

Other expenses detailed in the findings of facts as attributable to the fire damage were losses directly resulting from the fire or reasonable expenditures to correct the fire repairs. The total costs and expenses resulting from the fire which are allowable as damages is $4,167.52.

c. Loss of Use Claim

As a factual matter, plaintiff was without the use of the ALLISSA [*sic*] for a period of approximately 14 months (February 3, 1977 to April 5, 1978) as a direct and virtually sole result of the fire. Plaintiff has clearly suffered a loss of use of the vessel in a factual and practical sense. Clearly, defendant is answerable for any damages flowing from such loss of use which are awardable. The issue, then, is whether, under the current state of the law, plaintiff can be awarded damages for loss of use of a pleasure craft which had no history of income and which was never intended to be used for anything other than the pleasure of its owner's shareholders. It is concluded that the law currently prohibits damages for loss of use in these circumstances.

The seminal case addressing this issue is *The Conqueror*, 166 U.S. 110 (1897), which involved a vessel "designed for pleasure only and [which had] never been put to any other use." *Id.* at 111. When the vessel was detained by a tax collector for a period of approximately five months, the owner sought $15,000.00 in damages for loss of use. In reversing the district court's award of damages, the Supreme Court stated:

> That the loss of profits or of the use of a vessel pending repairs or other detention, arising from a collision or other maritime tort, and commonly spoken of as demurrage, is a proper element of damage, is too well settled ... to be open to question. It is equally well settled, however, that demurrage will only be allowed when profits have actually been, or may be reasonably supposed to have been, lost, and the amount of such profits is proven with reasonable certainty .... [I]n order to entitle a party to be indemnified for what is termed in this court a consequential loss, being for the detention of his vessel, two things are absolutely necessary,—actual loss, and reasonable proof of the amount. It does not follow, as a matter of necessity, that anything is due for the detention of a vessel while under repair.

Id. at 125.

The decision in *The Conqueror* remains the law and is cited as such by many circuits. In addition to those cases cited in defendant's brief (*Oppen* v. *Aetna Insurance Company*, 485 F.2d 252 (9th Cir. 1973), *Snavely* v. *Lang*, 592 F.2d 296 (6th Cir. 1979), and *Thomson* v. *United States*, 266 F.2d 852 (4th Cir. 1959)), are the decisions of other circuits based on the holding in *The Conqueror*. *See, e.g., Mid-America Transp. Co.* v. *Cargo Carriers, Inc.*, 480 F.2d 1071 (8th Cir. 1973), *Mitsui O.S.K. Lines, KK.* v. *Horton & Horton, Inc.*, 480 F.2d 1104 (5th Cir. 1973). Although in the two latter cases the vessels were commercial in nature, the courts nevertheless reversed their respective lower courts in the award of damages for loss of use because such damages in these cases were deemed speculative.

If a court is apt to find damages for loss of use of a commercial vessel speculative, then *a fortiori* damages for loss of use of a pleasure craft, where no profit comparison can be made, is speculative.

In *Thomson* v. *United States, supra,* which concerned a pleasure craft damaged when it struck a submerged wreck, the Fourth Circuit cited *The Conqueror* in denying damages for loss of use because such damages were "highly speculative and immeasurable." *Id.* at 856. *Thomson* remains the law in the Fourth Circuit and thus appears to be dispositive.

Plaintiffs rely heavily on Justice Cardozo's opinion in *Brooklyn Eastern District Terminal* v. *United States,* 287 U.S. 170 (1932), which states:

> Even [if the vessel is employed for pleasure], in the judgment of many courts, the value of the use may be considered by the triers of the facts in fixing the recovery if there has been a substantial impairment of that enjoyment for which such vessels are maintained.

Id. at 175.

While the reasoning of the opinion would appear sound, the quoted section was inapplicable to the facts in that case because *no pleasure craft was involved in that case.* It would seem to follow that the quoted statement is pure dictum.

While plaintiffs are able to cite examples of well-reasoned contrary authority (*e.g., The Vanadis,* 250 F. 1010 (S.D.N.Y. 1918), the weight of authority, especially in the Fourth Circuit, favors the defendant.

It strikes one as fundamentally unfair that a yacht owner can be deprived of the use of an asset of substantial value (in the range of $750,000.00 to $1,000,000.00 on the facts of this case) for a substantial period solely as a result of another's negligence and yet be wholly denied money damages for such loss of use simply because the asset was a pleasure craft. One wonders why the tortfeasor should benefit from the fact that an

asset owner chose to forego commercial operations when there is far less speculative nature or other question concerning ascertainable damages in these circumstances than there is concerning general damages in the run-of-the-mill personal injury case.

An aspect of this case which favors the plaintiff is the time factor involved. The cases cited by the defendant *did not involve the length of time presented by the facts in this case.* Also, while the arguments against speculative damages may have some merit, a rule of law which allows *no* damages for loss of use for a pleasure craft, no matter what its nature and no matter what the length of time, appears on the surface to be draconian. A treatise on the subject indicates a trend toward the policy of allowing recovery for loss of use. See D. Dobbs, *Remedies,* Sec. 5.11, Loss of Use Resulting from Injury or Destruction of Chattels (West Publishing Co., Hornbook Series).

In spite of equities which would cause the undersigned to decide differently if this court were writing on a clean slate, the current state of the law compels a holding that plaintiff is not entitled to general damages to compensate for its loss of use of the vessel. Because of this conclusion of law, no attempt is made to determine conclusively what would have been a proper measure of damages or method of computing damages for loss of use.[10]

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[10] If the law changed, or if the Fourth Circuit, on the facts of this case, should deem damages for loss of use awardable, an issue concerning the proper measure of such damages would arise. Plaintiff urges the net charter rate as a measure of damages. However, this measure would assume or require proof of a vessel in top operating condition and would require detailed proof of rates and expenses and likely charters to arrive at a fair net. Such a measure could be unfair to the extent it might result in application of a lucrative charter rate to

(Footnote continued on following page)

d. Plaintiff's Claim for Insurance Premiums

Although, as found above, plaintiff expended substantial sums for insurance premiums on property damage and liability policies applicable to the vessel during the period of fire damage repairs and times subsequent thereto, it is concluded that under the current state of the law, plaintiff must be deemed to have received the value of such insurance protection and consequently is not entitled to recover the premium payment amounts from defendant.

Although plaintiff cites a case in which a court allowed a recovery for insurance premiums (*Hillstrom Shipbuilding* v. *Smith*, 1979 A.M.C. 2668, 2680 (D.Or. 1978)), the clear weight of authority supports the defendant's position that insurance premiums allocable to detention time are not recoverable damages. *See e.g. Cliff, Jr. Inc.* v. *M. V. Captain Will*, 526 F.2d 345, 347 (5th Cir. 1976); *Sinclair Refining Co.* v. *The American Sun*, 188 F.2d 64, 67 (2nd Cir. 1951).

A claim for insurance premiums which accrued during a loss-of-use period would appear to be a non-speculative item of damages to the extent of cost of coverage a prudent yacht owner would maintain during such periods and would be awarded if this court were writing on a clean slate. Never-

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(Footnote continued from preceding page)

a vessel which was never chartered, which could not legally be chartered and concerning which charter was not only never contemplated but was expressly declined.

A fairer measure of damages which would be considerably easier to apply (and which would result in far less distracting evidence over collateral detail) would consist of application of a fair average interest rate earnable during the loss-of-use period to the value of the vessel just preceding the event resulting in loss of use. An alternative rate could be that applicable to delinquent federal income tax payments during the loss of use period. Use of the state "legal" or judgment rate would cause undesireable variance in result depending on a location of the tortfeasor and such rates are generally below prevailing interest rates on investments.

theless, as a result of the law cited, both to the effect that a party may not recover damages for loss of use of a non-commercial pleasure craft and to the effect that one who purchases insurance receives its value through the protection it affords, it is concluded that plaintiff may not recover any amount for insurance premium expenses.

e. Miscellaneous

It is concluded that defendant had no duty to check porthole gaskets during the fall repairs beyond the hose test which it conducted and that consequently defendant bears no liability for any damages resulting from flooding through portholes during the storm on the voyage from Norfolk to Charleston.

It is concluded that none of the four flooding episodes described in the findings of fact involving the sanitation system resulted from any breach of any contractual or other duty which defendant owed to plaintiff.

It is concluded that defendant breached no duty owing to plaintiff in connection with the care of the Riva and that any losses or expenses involving the launch which may have been incurred by plaintiff are not items for which defendant is liable.

It is concluded that defendant is in no way liable for the cost of removing any marine growth which may have accumulated on the hull of the ALLISSA [*sic*] after it left defendant's yard in September 1978.

f. Defendant's Counterclaims

On facts found concerning the unequivocal undertaking by defendant to make the necessary fire damage repairs (Pl.Exh. A) and its acceptance of legal liability for all "repairs and renewals" necessitated by the fire and the absence of any "red

letter clause" form being applicable to such repairs (it being specifically concluded that even if such a form did apply to the fall repairs, the March 3, 1977 written undertaking varied its terms), there is no theory under which defendant is entitled to recover the cost of the fire damage repairs (less $300,000.00) necessitated by its negligence and its counterclaim for such amount ($549,544.53) must be denied.[11]

At all times material to defendant's counterclaim for the Virginia sales tax item, the ALLISSA [*sic*] was a vessel used principally in interstate or foreign commerce within the meaning of Sec. 58-441.6(i) of the Code of Virginia (1950) as in effect during material times. The work to which the sales tax portion of the counterclaim relates consisted of repairs or alterations to such vessel. It is, therefore, concluded that the repairs to which the counterclaim relates are excluded from the definition of a "sale at retail" to which the tax imposed by Sec. 58-441.4 of the Code of Virginia applies and to which the certificate provisions of 58-441.17 apply. It follows that defendant's counterclaim for the Virginia sales tax item in the amount of $390.95 must be denied.

g. Prejudgment Interest

It is generally recognized that the allowance or withholding of prejudgment interest is within the sound discretion of the court. *Maryland Shipbuilding and Drydock Co.* v. *Patapsco Scrap Corp.*, 169 F.Supp. 605 (D.Md. 1959). "Although in admiralty the award of prejudgment interest rests in the discretion of the trial court, interest should be granted unless there are exceptional or peculiar circumstances." *Mid-America Transportation Co.* v. *Rose Barge Line, Inc.*, 477 F.2d 914, 916

[11] The "red letter clause" form dated February 3, 1977 (Df.Exh. 1-I), although received by plaintiff on March 10, 1977, never became a limitation on defendant's undertaking to repair fire damage set forth in its March 3, 1977 letter (Pl.Exh. A).

(8th Cir. 1973). *See Norfolk Shipbuilding and Drydock Corp.* v. *M/Y LA BELL SIMONE,* 537 F.2d 1201, 1204 (4th Cir. 1976). If prejudgment interest is to be awarded, the rate of such interest is also a matter within the sound discretion of the court. See *Admiralty-Prejudgment Interest,* 34 A.L.R. Fed. 126 (1977), esp. Sec. 9 and cases cited therein.

A rate of six percent per annum seems generally assumed to be the "usual" admiralty rate but this rate came into vogue at times when it was higher than, perhaps well above, the usual rate which might be earned on a conservative investment. *Id.* Clearly, the function of pretrial interest is the same as that for every other item of compensatory damages, that is, to make the plaintiff whole for a loss. *Federal Barge Lines, Inc.* v. *Republic Marine, Inc.,* 616 F.2d 372, 373 (8th Cir. 1980), *Norfolk Shipbuilding and Drydock Corp.* v. *M/Y LA BELL SIMONE, supra,* at 1204. The "usual" admiralty rate of six percent is inadequate for that purpose in these times. Indeed, the defendant charges twelve percent per annum on its charges for ship repairs (see Df.Exh. 1-A, 1-B, 1-H and 1-I) and this charge has been upheld as a reasonable guideline for pre-judgment interest in admiralty. *Norfolk Shipbuilding and Drydock Corp.* v. *M/Y LA BELL SIMONE, supra,* at 1204 n.2.[12] An annual rate of twelve percent appears to be a fair prejudgment interest rate on damages awardable in this case in view of interest rates available on conservative investments at times material in this case and especially in view of the fact that defendant routinely charges this rate on delayed payments under repair contracts.

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[12] *Cf. Marsteller Corp.* v. *Ranger Construction Co.,* 530 F.2d 608 (4th Cir. 1976) (Virginia's maximum contract rate is pre-judgment interest limit in a *diversity* judgment case in federal court sitting in Virginia).

"It is well established that a federal court in setting the rate of prejudgment interest in admiralty actions is not bound by state statutory interest rates." *Federal Barge Lines, Inc.* v. *Republic Marine, Inc.,* 616 F.2d 372, 373 (8th Cir. 1980).

All of the damages deemed awardable to plaintiff were ascertained or ascertainable not later than February 1, 1979.

It is concluded that plaintiff is entitled to prejudgment simple interest at a rate of twelve percent per annum from February 1, 1979. It is further concluded that such prejudgment rate should continue after judgment. See 28 U.S.C. Sec. 1961 incorporating Sec. 8.01-382 of the Code of Virginia, 1950, as amended.

C. ORDER

It is ORDERED that plaintiff recover of defendant the sum of $7,756.57 together with simple interest at the rate of twelve percent per annum from February 1, 1979 until paid.

It is further ORDERED that defendant's counterclaim be DENIED and DISMISSED.

The Clerk shall forward a copy of this Opinion and Order to each counsel of record.

D. REVIEW PROCEDURE

Because all parties to this action elected an appeal directly to the United States Court of Appeals for the Fourth Circuit, any aggrieved party may appeal from the judgment in this action in the same manner as on an appeal from any other judgment of this court. See 28 U.S.C. Sec. 636(c)(3).

James T. Turner
United States Magistrate

Norfolk, Virginia
September 1, 1981

Docket No. 82-95

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM 1982

NORDASILLA CORPORATION
Petitioner,

v.

NORFOLK SHIPBUILDING &
DRYDOCK CORPORATION,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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DOCKET NO. 82-95

IN THE
SUPREME COURT OF THE
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NORDASILLA CORPORATION,
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v.
NORFOLK SHIPBUILDING &
DRYDOCK CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Respondent, Norfolk Shipbuilding & Drydock Corporation, respectfully requests the Court deny the Petition for a Writ of Certiorari seeking review of the Fourth Circuit's decision in this case. The opinion below is reproduced at Petition, 1a, et seq.

STATEMENT OF THE CASE

After the fire of February 3, 1977, Petitioner's yacht ALISSA was extensively rebuilt by Respondent, at no cost to Petitioner except for items agreed to be unrelated to the fire. There was no allowance made for depreciation, and Petitioner received back a rebuilt, refurbished yacht, new for old.

Mr. and Mrs. Armstrong, majority stockholders of Petitioner, testified that if the ALISSA had not been detained at Norshipco for the fire repairs, they would have made a voyage to Alaska, returning through the Caribbean to Europe to sell the vessel (7a). However, during the years between redelivery at Norshipco in the spring of 1978 and March 1, 1982, according to trial testimony and, Petitioner's Reply Brief below, the postponed voyage was never taken either on a substitute vessel or after the ALISSA was available.

Nordasilla Corporation "has never been and apparently was never intended to be a profit-making company or a "business" in the ordinary sense of the word." (7a).[1] "It was never intended by the Armstrongs

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[1] Page references are to Petitioner's Appendix.

or the plaintiff to charter the vessel or to derive income from her in any way other than ultimate resale." (7a). The yacht ALISSA ". . . . had no history of income and which was never intended to be used for anything other than the pleasure of its owner's shareholders." (28a).

The District Court found upon the facts of this case that there could be no recovery for loss of use based upon The CONQUEROR, 166 U.S. 110 (1897) and Thomson v. United States, 266 F.2d 852 (4th Cir. 1959). The District Court also rejected Petitioner's proof of damages which were based upon charter rates, even assuming loss of use damages had been recoverable in this case:

> Plaintiff urges the net charter rate as a measure of damages. However, this measure would assume or require proof of a vessel in top operating condition and would require detailed proof of rates and expenses and likely charters to arrive at a fair net. Such a measure could be unfair to the extent it might result in application of a lucrative charter rate to a vessel which was never chartered, which could not legally be chartered and concerning which charter was not only never contemplated but was expressly declined. (31a, footnote 10).

At the Court of Appeals, Petitioner advanced three arguments:

1. The CONQUEROR has been misinterpreted by the District Court in this case and by the Fourth Circuit in Thomson, or:

2. There are sufficient factual differences between The CONQUEROR and NORDASILLA which distinguish the two, or:

3. The law of The CONQUEROR is long overdue for re-examination and change.

In its Petition filed herein, Petitioner has abandoned points 2 and 3, apparently accepting the determinations below that The CONQUEROR remains the law of the land and is factually indistinguishable from our case.

At the Court of Appeals, Petitioner also adopted a new theory of damages based upon application of an arbitrary interest rate, not submitted at the District Court, to the alleged value of the ALISSA for the period of detention.

The Court of Appeals affirmed, per curiam, refusing to distinguish this case from The CONQUEROR and Thomson.

ARGUMENT

1. THE DISTRICT COURT AND THE FOURTH CIRCUIT CORRECTLY INTERPRETED THE CONQUEROR IN HOLDING THAT NORDASILLA CORPORATION COULD NOT RECOVER LOSS OF USE DAMAGES FOR THE DETENTION OF ALISSA AT NORSHIPCO FOR FIRE REPAIRS.

Neither the District Court nor Court of Appeals, nor, of course, The CONQUEROR has stated that there can never be recovery for loss of use of a yacht. Although the charterer of a yacht may use the yacht solely for pleasure, detention of such a yacht which deprives the owner of charter hire would apparently result in demurrage damages under The CONQUEROR:

> It is not the mere fact that a vessel is detained that entitles the owner to demurrage. There must be a pecuniary loss, or at least a reasonable certainty of pecuniary loss, and not a mere inconvenience arising from an inability to use the vessel for the purposes of pleasure. . . . In other words, there must be a loss of profits in its commercial sense. In all the cases in which we have allowed demurrage the vessel has been engaged, or was capable of being engaged in a

> profitable commerce, and the amount allowed was determined either by the charter value of such vessel, or by her actual earnings at about the time of the collision. The Conqueror, however, did not belong to the class of vessels which are engaged in commercial pursuits, or are ordinarily let to hire. There is doubtless a class of pleasure boats that are let for excursions, and become a source of pecuniary profit to their owners; but the Conqueror did not belong to that class. She was purchased by her owner for his personal pleasure, and there is not an atom of testimony tending to show that he bought her for hire, or would have leased her if he had been able to do so. . . . 166 U.S. at 133.

The Supreme Court set forth in The CONQUEROR a two part test for permitting recovery of demurrage (loss of use):

> It is equally well settled, however, that demurrage will only be allowed when [1] profits have actually been, or may be reasonably supposed to have been, lost, and [2] the amount of such profits is proved with reasonable certainty. 166 U.S. at 125.

The Supreme Court was apparently reviewing a somewhat sparse record on the question of damages. The question of demurrage damages was not addressed in the District Court opinion, 49 Fed. 99 (S.D.N.Y. 1892), and the Court of Appeals affirmed the District Court and a commissioner's decree for damages, without an

opinion. In reversing the $15,000 demurrage damages granted by the commissioner, the Supreme Court found that the yacht owner failed both tests for demurrage, either of which failures precluded recovery.

The present case is virtually identical. The only significant difference is that the loss of recreation or deferred enjoyment was not in this case even suffered by Petitioner, but rather by two of Petitioner's stockholders who are not parties to the litigation. Petitioner admits, as the District Court found, that there was never any intention of employing ALISSA in the charter trade, or in any way to use her for profit. (7a). Moreover, ALISSA could not legally have been chartered, and all inquiries along those lines had been declined. (32a). Clearly, and as the courts below have found, Petitioner failed the first test set forth in The CONQUEROR. This failure alone was sufficient to preclude any loss of use recovery according to The CONQUEROR, Thomson and the courts below in this case.

While the District Court decided the case solely on the first test, it also demonstrated in dicta

Petitioner's failure of the second test. Just as in The CONQUEROR, Petitioner below attempted to prove damages via testimony of charter rates for other vessels. However, the District Court demonstrated the unacceptability of this proof due to lack of evidence of a vessel (ALISSA) in top operating condition, lack of detailed proof of rates, expenses and likely charters. Moreover, even if such proof had been submitted, charter rates would be an unfair measure of damages because ALISSA was never chartered and could not legally be chartered. (32a). The same insufficient charter evidence was discarded by the Supreme Court in finding that there was a failure of the second test in The CONQUEROR — the amount of damages.

While the District Court in dicta and plaintiff at the Fourth Circuit discussed alternate theories of damages, such alternate theories were not advanced at trial, and, it is submitted, may not therefore be pursued. In United States v. One 1971 Mercedes Benz 2-Door Coupe, 542 F.2d 912 (4th Cir. 1976), the Fourth Circuit responded to a similar attempt:

> The owner's remedy, if any, on the issue of valuation must be presented to the

> District Court. Questions not raised and properly presented in the trial forum will not be noticed on appeal, in the absence of exceptional circumstances. Id. at 915.

Petitioner below chose to meet test two (quantification of damages) with evidence on charter rates. It chose to rise or fall on charter rates, just as was the case in The CONQUEROR. In both cases the vessel owner failed in its proof, and that failure alone is sufficient to preclude recovery.

2. THERE IS NO CONFLICT BETWEEN THIS DECISION AND ANY SUPREME COURT DECISION OR ANY COURT OF APPEALS DECISION.

In alleging the contrary Petitioner cites one Supreme Court case, Brooklyn Eastern District Terminal v. United States, 287 U.S. 170 (1932) and one Court of Appeals case, The EROS, 251 F. 45 (2d Cir. 1918).

While Petitioner spends much time arguing and quoting dicta from Brooklyn, the critical points are glossed over:

1. Brooklyn involved loss of use of a commercial tugboat, not a yacht.

2. Brooklyn disallowed the demurrage claim.

It is a measure of the lack of precedent available to Petitioner that it must rely heavily on a case involving a commercial vessel, and which case had the opposite result on demurrage from that which Petitioner seeks here. Considering the dicta cited by Petitioner, it appears that there was an error in reading The CONQUEROR. In Brooklyn it is stated that the CONQUEROR would not have been used during the period of detention. 287 U.S. at p. 175. In fact the statement was:

> . . . . During more than one-half the time for which demurrage was allowed she [CONQUEROR] probably would have been laid up at her wharf. 166 U.S. at p. 134.

Therefore, the owner of the CONQUEROR should have received demurrage, by Petitioner's reasoning, for at least that half of the detention time she would have been used for her owner's pleasure, but the Supreme Court found he was due no demurrage.

Petitioner does not allege that The EROS decision is in conflict with the present case, only that a District Court case may so allege. In fact, The EROS is not in conflict with The CONQUEROR, nor Thomson,

nor the present case. The EROS was a yacht chartered for hire. While the charterer's use of the vessel was to have been a pleasure cruise, the fact remains that the transaction was a commercial venture with a written contract and a specific sum of money changing hands. When the owner breached the contract (charter party), the Court computed damages based on the difference in charter rates between the EROS and the substitute vessel actually hired. The EROS was a vessel of that:

> . . . . class of pleasure boats that are let for excursions, and become a source of pecuniary profit for their owners; but the CONQUEROR did not belong to that class. 166 U.S. at p. 133

Nor did the ALISSA belong to that class. There is no conflict with The EROS.

3. ALL OF THE COURTS OF APPEAL CONSIDERING THE CONQUEROR HAVE AGREED IT IS STILL GOOD LAW AND HAVE INTERPRETED IT AS THE COURTS IN THIS CASE HAVE.

Since Petitioner is not advocating here a reversal of The CONQUEROR as it advocated at the Court of Appeals, there is no need to discuss cases such as Mitsui O.S.K. Lines, K.K. v. Horton & Horton, Inc., 480 F.2d 1105 (5th Cir. 1973) and Mid American

Transportation Co. v. Cargo Carriers, Inc., 480 F.2d 1071 (8th Cir. 1973), which cite The CONQUEROR as continuing to be good law on the question of demurrage. However, there are three decisions from various Courts of Appeal which demonstrate that the decision in this case by the District Court and the Court of Appeals correctly interpreted and relied upon The CONQUEROR:

1. Thomson v. United States, 266 F.2d 852 (4th Cir. 1959).

2. Snavely v. Lang, 592 F.2d 296 (6th Cir. 1979).

3. Oppen v. Aetna Insurance Company, 485 F.2d 252 (9th Cir. 1973).

In responding to these cases below Petitioner discarded Thomson as being a bad decision and attempted to distinguish the other two. Considering the language in those two cases, it is a difficult task. Both cases involved an alleged loss of use of private, pleasure vessels, and in both cases money damages were refused, citing The CONQUEROR.

> The seminal case in the area of damages for loss of use is The CONQUEROR. . .

> . The CONQUEROR has been interpreted as creating an ironclad rule that under federal maritime law demurrage is not an allowable item of damages for loss of use of a private pleasure craft. Snavely, supra, at p. 298.
>
> [and]
>
> The loss of one summer season [192 days] of occasional yachting is an inconvenience, but cannot be considered a deprivation sufficient to justify a substantial award of damages. There is no way to tell how often the yacht would have been used, nor to estimate the value of recreation deferred for a period of time. . . . While the court is sympathetic to any loss of time spent together by a family, an award of damage for such a loss opens the courts to imagination and speculation in evaluation of damages. It is precisely these types of claims for damages which render too "highly speculative and immeasurable" an award for demurrage in the case of a vessel used purely for recreation. Id. at pp. 299-300.

Oppen says the same thing more concisely:

> Under federal maritime law loss of use of a private pleasure boat is not a compensable item of damages. Id. at p. 257.

In both cases the yacht owners alleged that Brooklyn had altered or limited the law as set forth in The CONQUEROR. The Sixth and Ninth Circuits responded as follows:

> The cited language in Brooklyn (287 U.S. at 175, 53 S.Ct. 103) was dictum. In our view it takes a new and contrary holding of the Supreme Court before we are relieved of our obligation to follow previous holdings of that court. Oppen at p. 257, footnote 12.
>
> [and]
>
> While appreciative of the reasoning in Brooklyn Eastern District Terminal, and with great deference to Justice Cardozo, the court is constrained to view The CONQUEROR as retaining its full vitality. Snavely at p. 299.

Clearly, all of the Courts of Appeal entertaining this question are in agreement with the decision below.

4. THE DISTRICT COURT AND STATE COURT DECISIONS CITED BY PETITIONER GIVE NO BASIS FOR A REVIEW OF THIS CASE BY THE SUPREME COURT.

Failing to find Supreme Court precedent in its favor, and there being no dispute among the Courts of Appeal, Petitioner attempts to bootstrap his case with a few scattered District Court cases and four State Court automobile decisions. The following brief comments are offered with respect to the cited cases, each of which is distinguishable factually and/or legally from this case.

1. The Lagonda, 44 F. 367 (E.D.N.Y. 1890) — decided prior to The CONQUEROR.

2. The Vanadis, 250 F. 1010 (S.D.N.Y. 1918) — this yacht was apparently a charter vessel since there was a discussion of the charter hire of $13,000 per month offered for her during the 1914 and 1915 seasons.

3. Yachts, Inc. v. The EDWARD F. FARRINGTON, 146 F.Supp. 754 (E.D.N.C. 1956) — "It [the yacht] had been and would have been available for commercial charter during this period but for the collision." at p. 758. Damages were based upon historical earnings and offers for charter during the period of detention.

4. Finkel v. Challenger Marine Corp., 316 F.Supp. 549 (S.D. Fla. 1970) — indicated that The CONQUEROR was no longer good law, and looked to state law for support.

5. English Whipple Sailyard Ltd. v. Yawl Ardent, 459 F.Supp. 866 (W.D. Pa. 1978) — this case was decided solely under Pennsylvania law without any reference to the various admiralty cases such as The CONQUEROR.

It is particularly inappropriate for Petitioner to seek support via analogy to the several state court automobile cases cited. The fire, repairs, detention and litigation in this case all took place in Norfolk, Virginia. Should there be any reason to look to state law for guidance, it would be to the law of Virginia, which states in pertinent part:

> Any person who shall be entitled to recover for damage to or destruction of a motor vehicle shall be entitled to recover, in addition to any other damages to which he may be legally entitled, the reasonable cost which was actually incurred in hiring a comparable substitute vehicle for a period of time during which such person is deprived of the use of his motor vehicle . . . Section 8.01-66 Code of Virginia, 1950, as amended (emphasis added).

Of course no substitute yacht was chartered. Virginia law would have the same result as maritime law in the present fact situation: no recovery for loss of use of ALISSA.

CONCLUSION

Petitioner has now withdrawn its request to have The CONQUEROR decision reversed. All of the Courts of Appeal decisions on point demonstrate that the Courts below in this case have correctly denied the windfall recovery sought herein. There is no basis under Rule 19 of the Rules of the United States

Supreme Court for granting the writ sought. The Petition should be denied.

Respectfully submitted,

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Counsel for Respondent
Norfolk Shipbuilding &
Drydock Corporation

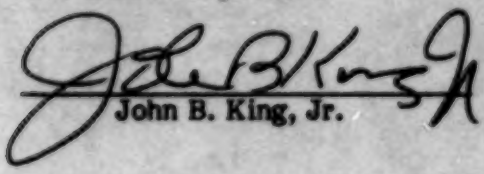
STATEMENT REQUIRED BY RULE 28.1

Respondent, Norfolk Shipbuilding & Drydock Corporation, is a Virginia corporation and is a fifty percent owner of Desert American Insurance Agency, Inc. — Virginia. The remaining fifty percent is owned by Desert American Insurance Agency, Inc., a subsidiary of El Paso Company. Respondent is also eighty percent owner of Marepcon Corporation — International.

CERTIFICATE OF SERVICE

I, John B. King, Jr., certify that on August 16, 1982, forty (40) copies of this BRIEF IN OPPOSITION were mailed or delivered to the Clerk, United States Supreme Court and three (3) copies were mailed to:

Counsel for Petitioner,
Nordasilla Corporation



John B. King, Jr.